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JOHN F. DAVIS, CL

In the

Supreme Court of the United States

October Term, 1965

Nos. 218, 322 and 420

John A. Burns, Governor of the State of Hawaii, *Appellee*

—v.—

William S. Richardson, *et al.*, *Appellee*

Elmer F. Cravalho, *et al.*, *Appellee*

—v.—

William S. Richardson, *et al.*, *Appellee*

Kahuhua Ahe, *et al.*, *Appellee*

—v.—

William S. Richardson, *et al.*, *Appellee*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR HAROLD S. ROBERTS
Amicus Curiae

HAROLD S. ROBERTS
Petitioner

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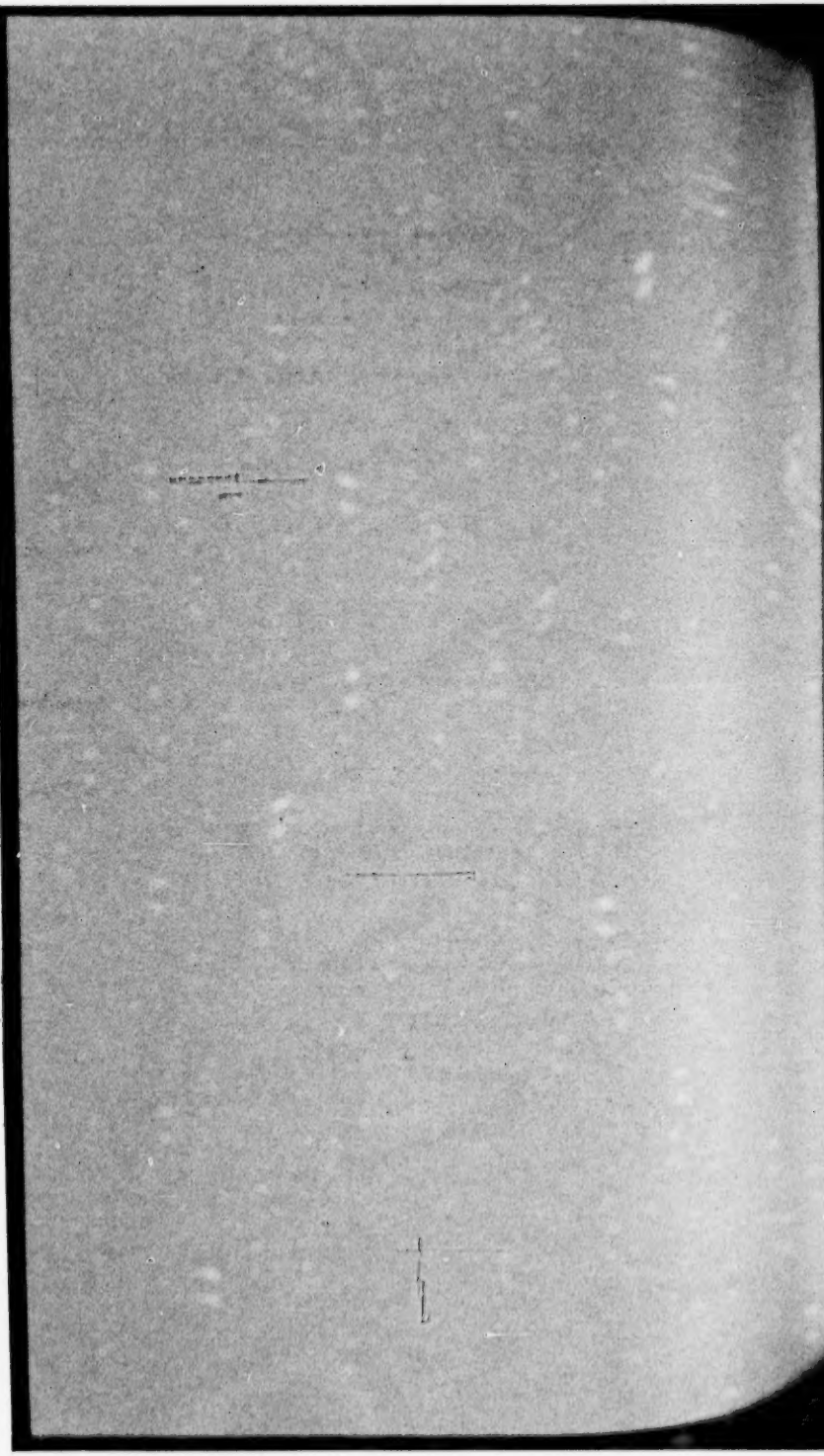
January 1966



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I - TIMELINESS

THE APPEALS WERE NOT TAKEN IN TIME

The principal Order of the District Court was filed in the Clerk's office on February 17, 1965. All of the parties had actual knowledge of the Order, and in fact a Motion to Alter was filed promptly. The March 9 and 19, 1965 Orders, in response to the Motions; did not stay any paragraph of the February 17 Order relating to the validity of the Hawaii Constitution apportionment provisions or relating to how to reapportion. That the February 17 Order was not "*entered*" technically until April 9, 1965 was the result of an oversight by the Clerk's office, but had no effect on the actual knowledge of the parties concerning the February 17 Order. The April 28, 1965 Order did not even mention the unstayed provisions of the February 17 Order.

The net result is that the appellants are trying to raise on appeal questions which were decided on February 17 and not changed thereafter, and the only way appellants seek to justify their failure to file notice of appeal within sixty (60) days after February 17, is on the technicality that the February 17 Order was not "*entered*", although all concerned not only had actual knowledge but acted upon it.

It is also apparent and supports our contention that all issues except the advisory temporary Senate reapportionment had been disposed of under the February 17 order and not appealed, that had the District Court accepted the Legislatures apportionment of the Senate, there would be no cases Nos. 318, 323 and 409 before this Court. Appellants are seeking to reopen all of the issues which had been previously decided.

II - STANDING OF THE GOVERNOR AS APPELLANT

THE GOVERNOR OF HAWAII HAS NO STANDING

Whether the Governor had standing to intervene as a plaintiff, and, if so, in what capacity, are questions which were not raised or decided by the District Court. (This is also true as to the intervening Senators and Representatives, and the objections to the Governor's standing appear to be equally applicable to their standing.) The Governor moved to intervene as a citizen, taxpayer, elector and voter, and also as Governor. No one objected. This is understandable. The Lt. Governor, being the operator of the election machinery in Hawaii, was defendant. He was not represented by the Attorney General. Instead, the Attorney General represented the Governor, so that the Lt. Governor was required to look elsewhere for counsel.

Thus, it is on this appeal that, for the first time the Governor's standing is being questioned.

As Amicus sees the situation, there are two possible capacities for the Governor -- (1) representative, as Governor; and (2) as an individual -- and the Governor does not have standing in either capacity.

As Governor, he represents the State of Hawaii--all of the people. Under the Hawaii Constitution (Article IV, Section 5) *"The governor shall be responsible for the faithful execution of the laws."* He is sworn to uphold the Constitution of the United States and the Hawaii State Constitution. Moreover, the State of Hawaii is in effect the defendant, as the Lt. Governor, upholding the Hawaii Constitution and statutes, represents all of the people. If the State, via the Governor, intervenes as plaintiff, the State is then on both sides of the litigation. Concerning his standing to intervene as Governor, the Governor himself is doubtful. The sole reference to standing in the Governor's Brief is found in footnote 8 on page 13. Therein, he does not state unequivocally that he has standing as Governor, but instead states his view in the following language *"whether or not he has standing in his capacity as Governor and as a representative of the people of Hawaii,..."* and does not cite any authority therefor.

In the above-mentioned footnote, the Governor does take the position that he has standing as a *"citizen, taxpayer and elector of the State of Hawaii and a qualified voter in Hawaii's Fifth Senatorial District and Eighth Representative District (R. 38)."* But how can the Governor have an individual capacity in reapportionment litigation? It is impossible for him to divest himself of his representative capacity as Governor. Usually the Governor is a defendant in such litigation. In footnote 8, on page 13, the Governor cites Baker vs. Carr,

369 U.S. 186, 204 n. 23 (1962), but that reference has no bearing on the Governor in his individual capacity as an intervening plaintiff in litigation where his Lt. Governor is defendant. Amicus has not found a single case where a state governor so intervened.

III - JURISDICTION

THIS COURT SHOULD REFUSE TO ACCEPT JURISDICTION

This Court has noted probable jurisdiction. However, no question raised is either federal or substantial, and in addition all questions raised are simply requests for advisory opinions.

In order to understand the foregoing conclusions, awareness of the history of reapportionment litigation in Hawaii in 1964 is necessary. The primary goal of plaintiffs in such litigation was the reapportionment of both chambers of the legislature, hopefully by the legislature itself, prior to the 1964 general election on the first Tuesday in November.

The decisions in Reynolds vs. Sims and the other reapportionment cases were announced by this Court in June 1964. In early July, the Attorney General of Hawaii issued a number of opinions on the effect of such decisions on the

Hawaii apportionment situation. These opinions were a complete package, covering the who, why and when of reapportionment. Soon thereafter, a friendly suit was instituted in the Supreme Court of Hawaii against the Lt. Governor, who is responsible for the election machinery, in the form of a submission on an agreed statement of facts. The Attorney General asked to appear as Amicus Curiae and on oral argument was asked why he was not representing the Lt. Governor. "*The plaintiffs in that suit sought to enjoin the conduct of any future election of members of the Legislature under existing apportionment law on substantially the same grounds alleged by the plaintiffs in this proceeding.*" Governor's Brief, page 89. When the Hawaii Supreme Court refused to grant such relief," . . . the case was dismissed by stipulation of the parties." (Governor's Brief, page 89, n. 4.) No appeal was taken from the decision of the State Supreme Court. Then the same law firm, with different plaintiffs, went across the street to the Federal Court and filed suit there, seeking the same relief. In this new action, the Attorney General represented the Governor, who moved to intervene as a plaintiff. The Lt. Governor was again the defendant and represented by private counsel. The District Court, like the Supreme Court of Hawaii, refused to enjoin the 1964 elections.

When the above-mentioned primary objective of the 1964 reapportionment litigation in Hawaii was not achieved, and especially after the District Court's

February 17, 1965 Order requiring conformance with Article XV of the Hawaii State Constitution, the strategy shifted and the legislators and the Governor, according to the District Court, requested that the legislature be given an opportunity to suggest a plan for temporary reapportionment of the Senate that the District Court might consider as its own and present such plan as a temporary plan for consideration by the people at the general election in 1966. The District Court, seeking to find an amicable solution, and *"by agreement of all the parties"* attempted to make such a solution possible.

The Hawaii Supreme Court considered the questions relating to the Hawaii Constitution to be matters *"of local law, not federal constitutional right."* Guntert vs. Richardson, 47 Haw., 662, 667; 394 P. 2d 444, 447 (1964). See Governor's Brief, page 89. It stated in the following language its reason for not acting: *"However, the legislature is now in special session. We must and do assume that the legislature will take suitable action. That possibility provides justification 'for a court of equity to stay its hand temporarily.'"* (47 Haw., at 668, 669; 394 P. 2d, at 448.) The Hawaii Supreme Court required the legislature to follow the amendment procedure of the Hawaii Constitution and either propose a constitutional convention or propose a constitutional amendment. The Legislature in the 1964 special session did neither at a cost of about $250,000.

There is no Federal question concerning the validity of the amendment provisions (Article XV) of the Hawaii State Constitution. Questions relating to how to reapportion--such as basis of apportionment (number of districts, single vs. multi-member districts) are merely requests for advisory opinions. Even if these questions were justiciable, they are not substantial. These issues, properly, are for a constitutional convention to consider in the light of all relevant factors, including the landmark decisions of this Court.

IV - ARGUMENTS IN SUPPORT OF THE FEBRUARY 17, 1965 ORDER OF THE DISTRICT COURT.

THE HAWAII LEGISLATURE LACKS POWER TO REAPPORTION ITSELF, EVEN TEMPORARILY.

On the "*merits*", the threshold issue is who shall reapportion. Only after it is passed, do the issues relating to how to reapportion, arise. To properly appraise and understand this question it is necessary to review briefly the history of legislative apportionment in Hawaii.

A - THE REQUIREMENTS OF THE HAWAII STATE CONSTITUTION:

1 - BACKGROUND OF REAPPORTIONMENT IN HAWAII (1900-1950)

The failure of Hawaii Territorial legislatures to reapportion under the Organic Act of 1900 led the delegates to the 1950 Convention, which wrote the present State Constitution, to devise a procedure which by-passes the legislature as the vehicle for reapportionment. It also set up mandamus provisions (Article III, Section 4) to require the Governor to carry out the ministerial functions in applying the equal proportions provisions of the Constitution. The people reserved to themselves the authority to revise or amend the Constitution; to re-draw the legislative districts and to provide the proper balance of power as among the three branches of Government. Efforts by the

Legislature or the Executive to change the structure and balance of the Hawaii State Government, without following the constitutional procedures set out in the constitution, must be strenuously opposed by the people of Hawaii. This is the major reason for the efforts of Amicus before this Court.

When the Constitutional Convention of 1950 wrote the revision and amendment procedures of the State Constitution, it was writing in awareness of the previous 40 years of failure of the Territorial legislature to reapportion under the existing Organic Act.

The Organic Act, the equivalent of our State Constitution while we were a Territory, provided that both houses of the legislature were to be reapportioned from time to time on the basis of citizen population.

Section 55 of the Organic Act dealing with the Legislative Power of the Territorial legislature provided in part: (31 St. at L. 141, c. 33 as amended. See Revised Laws of Hawaii, 1945, p. 32.):

> "The legislature, at its first regular session after the census enumeration shall be ascertained and from time to time thereafter shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of population in each of said districts who are citizens of the Territory;...." (Emphasis added.)

The record of Hawaii's legislature was typical of many mainland legislatures. They failed to carry out the provisions of statutory or constitutional requirements to reflect the changing population patterns which developed so rapidly during the 20th century -- a shift from the rural agricultural communities to the urban industrial centers of the several states.

Although the Organic Act provided for periodic reapportionment of both houses, reapportionment of the senate was not required by the 1950 Constitution. The apportionment of the Hawaii senate was more or less set on the basis of geography, giving the neighbor isles a majority of the senators in the legislature.

The apportionment procedure for the lower house followed the procedure of equal proportions used by the House of Representatives in the federal Congress. It is generally accepted as a reasonable statistical device for apportioning seats to reflect changes in population. Other procedures may be more equitable, but it is a procedure which this Court has held valid.

Procedures for Amending the Hawaii Constitution of 1950.

The procedures for revising and amending the Constitution are twofold. One permits amendments to be proposed by the legislature, which, if approved by a two-thirds vote in both houses during a session, or if by a majority in two

sessions, would be submitted to the people at a general election for their approval or disapproval. If the people approve the constitutional amendment, it then becomes effective. The second procedure is for the calling of a constitutional convention which has the authority to review the constitution and make recommendations for changes. These are subsequently submitted to the people for ratification, and if approved by them, they become effective. In both cases, prior approval by the people is required before the constitutional change becomes effective.

This is the clear meaning of Article XV of the Hawaii State Constitution. It is also clear in the committee report which presented the Revision and Amendment section of the Constitution. The report stated in part:

> *"Your committee was in general agreement that the method of adoption or ratification of an amendment or revision should be only by direct popular vote and has so provided in the proposal submitted."*

The Constitutional Convention adopted the committee's report and recommendations, and the people of Hawaii adopted the Constitution by a three to one vote. It would appear clear, therefore, that the legislature and the Executive are required by the clear and explicit language of the Constitution, the committee report and the intent of the convention delegates, as well as by their

oath of office, to support the Constitution of the State of Hawaii.

The following comments from the debate on the revision and amending section of the Constitution illustrate the position of the delegates with regard to keeping reapportionment in the hands of the people:

During the discussion of an amendment proposed by Delegate Mizuha that "*constitutional conventions may be called as provided by the law,*" the delegates made it clear they were not going to leave the question to the discretion of the legislature.

> "*ROBERTS: I believe it was the original intention of this article, that the proviso for a constitutional convention be self-executing ...the original purpose...(dealing with the establishment of a constitutional convention was designed) so that the thing is kept out of the hands of the legislature...The language ought to be mandatory. It should not be left to the legislature to authorize such State officer to act.*" (Proceedings of the Constitutional Convention, Morning Session, June 15, 1950, p. 74).
>
> "*MAU: If this motion is carried and that provision is placed in the Constitution, we may find ourselves in the same position as we have found ourselves in the last 40 or more years on the question of reapportion-*

ment. The legislature may do nothing about it, and I think it should be mandatory that the constitutional convention be called every so often...if we adopt that amendment, we won't have that opportunity if the legislature will conduct itself as it has in the past on the matter of reapportionment." (Proceedings, p. 748). (Emphasis added).

"TAVARES: ...It seems to me that's a reasonable provision (the provision submitted by the Committee) and if you just leave it up to the legislature as it has been said, there is a possibility that the legislature may not act for 20, 30 or 40 years." (Proceedings, p.748).

"ROBERTS: It seems to me that providing language which merely authorizes the legislature to call for such a convention completely misses the purpose of the original proposal. This proposal mandates, it requires that the people review periodically, in this section every ten years to examine the Constitution, to examine the interpretations, and find out whether or not the Constitution at that stage is still the kind of Constitution they want...The people ought to have the opportunity, apart from the proviso based on whether the legislature wants it or not, to vote on that question periodically." (Proceedings, p. 748).

> *"TAVARES: ...This provision is meant to be self-executing. We don't want any more situations where, as at present, for 50 years the legislature failed to do something that is supposed to be done."* (Proceedings, Afternoon Session, June 15, 1950, p. 749.)
>
> Delegate Mizuha's amendment was voted on and lost.

The Constitution is clear; the committee report of the Constitutional Convention as well as the discussion on the floor of the convention appears clear on the procedure for revision and amendment of the State Constitution. In addition, the question was submitted to the Hawaii State Supreme Court and it upheld the contention that the only proper way to amend the Hawaii State Constitution is under the procedures set out in that document. (Guntert v. Richardson, 47 Haw., 394 P2d. 444 (Haw. July 27, 1964.)

When the issue came before the District Court, the Court stated very emphatically:

> *"As pointed out by the Supreme Court of Hawaii...any change in the representation from any senatorial district must be by constitutional amendment. This Court concurs!"* (February 17, 1965 decision and order).

The question might be asked as to why it is so important that the provi-

sions of the State Constitution be followed when the legislature was willing to come up with a plan and did so at the 1965 regular session of the legislature (although held invalid by the District Court). In order to clarify this point, it is important to note two things: First, if a legislature can nullify or change a provision of the Constitution in a manner which is not provided within the constitution, or through some plenary authority which it might claim, this makes meaningless the specific terms and provisions of a constitution. Secondly, it is important to draw a clear distinction between the function and purpose of a constitution and the function of a statute.

Under the Constitution the people reserved certain rights to themselves and delegated only to the extent that they desired to delegate authority.

The importance of constitutional amendments and procedures for changing a constitution is set out in the restatement of constitutional law which was cited in the case before the Hawaii Supreme Court. 11 Am. Jur. Constitutional Law, Section 22, reads:

> *"It is settled that amendments to our (State) Constitutions are to be made only in modes pointed out or sanctioned by the instrument itself, the legal exponent of the will of the majority, which alone is entitled to the force of law.*

Under our institutions sovereignty resides in or with the people and may be exercised in the manner they have provided by the Constitution. The power to change a state Constitution is generally exercised in either one of two methods -- namely, by convention of delegates chosen by the people for the express purpose of revising the entire instrument or through the adoption by the people of propositions for specific amendments that have been previously submitted to it by the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred on the legislature in reference to proposing amendments, as well as to calling a convention, must be strictly pursued.

Any attempt to revise a Constitution or adopt a new one in any manner other than that provided in the existing instrument is almost invariably treated as extraconstitutional and revolutionary."

It is important, if we are to give meaning and substance to our Constitution that before any reapportionment is actually put into effect and elections held under a changed reapportionment provision, it must first be approved by the people through referendum vote. There is no real choice provided to the people if reapportionment has already been established and the legislature elected under the new reapportionment plan, and the people faced with an ex-post facto situation.

The Constitution of Hawaii does not extend authority to the legislature to reapportion on a permanent or temporary basis. Article III, dealing with the legislature, says in Section 1:

> *"The legislative power of the State shall be vested in the legislature, which shall consist of two houses, a Senate and a House of Representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this Constitution or the Constitution of the United States."*

Action by the legislature to reapportion itself would be inconsistent with the provisions of the State Constitution. The revision and amending procedures are specific and clear and are supported by the decisions both of the Supreme Court of the State of Hawaii and the Federal District Court.

For this Court to accept the position of appellants, that it is possible for the legislature to reapportion itself, and/or to give the Executive authority to re-district, which is in direct conflict with the clear language of the Hawaii State Constitution, the Report of the Revision and Amendment Committee of the Convention, and the statements of the Delegates on the floor of the Convention, is to undermine and ultimately destroy an integral and necessary part of the Hawaii State Constitution, (Article XV), which article is not in conflict with the Federal Constitution. This Court should not permit itself to become a party to destroy such an essential element of constitutional government.

2. THE LEGISLATURES ROLE IN REAPPORTIONMENT IN HAWAII

We now return to our contention that on the *"merits"*, the threshold issue is who shall reapportion. The question of *"who"* must be in the context of Hawaii's history and Constitution.

Appellant divides the who issue into temporary and permanent reapportionment, admitting that permanent reapportionment requires that the Hawaii Constitution be amended. During the 1964 special session, appellants argued that they had plenary power to apportion permanently.

As to temporary reapportionment, the Governor contends that the legislature has power. Amicus contends that the legislature does not have power. As authority, appellant relies on one case, saying *"The holding of the District Court flies in the face of Maryland Committee vs. Tawes, 377 U.S. 656 (1964)"* Governor's Brief, page 86.

However, the Maryland case does not govern the Hawaii situation, as the constitutions are fundamentally different as to: (1) reapportionment of the legislature (2) power of the legislature; and (3) relative power of the legislature and the people concerning amendment.

In Maryland, there is no constitutional provision concerning reapportionment of the legislature; in Hawaii, there are provisions dealing

with reapportionment of the legislature (the House of Representatives). Haw. Const., Art. III, Sec. 4.

In Maryland, there is no provision in the constitution concerning amendment, other than a provision for the ascertaining at a general election each twenty (20) years, *"the sense of the people in regards to calling a Convention for altering this Constitution."* Md. Const., Art. XIV, Sec. 2. But the only way in which the sense of the people can be translated into a constitutional convention is by action of the legislature. Thus, if the Maryland legislature chooses not to act, there is no method by which the constitution may be amended. In Hawaii, there is a provision in the constitution concerning amendment. (Haw. Const., Art. XV.)

In Maryland, the legislature is given plenary power. In Hawaii, *"All political power of the State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority."* (Haw. Const., Art. I, Sec. 1).

To sum up, if the framers of the Hawaii Constitution had wanted the legislature to have power to reapportion itself, they would have said so. They did not say so.

Thus, in Maryland the only possibility was temporary reapportionment, and the only choice was between the legislature and the courts. In Tawes, this Court gave the Maryland legislature another chance, even though its past

performance did not justify it, for, although the people of Maryland in the 1950 general election had approved by an almost four to one majority the convening of a constitutional convention, the Maryland legislature repeatedly refused to enact the necessary enabling legislation. Nor did the Maryland legislature, after Tawes, justify the Supreme Court's confidence in it, having failed to complete action on reapportionment in the 1965 regular session which adjourned March 30. In Hawaii there is no temporary reapportionment choice between the legislature and the courts, for the legislature has no such power.

The Governor's Brief, page 88, also cites Roman vs. Sincock, 377 U.S. 695 (1964) for the proposition that reapportionment is basically a legislative function. This Court did so state in that case, because under the Delaware constitution the amendment power was in the legislature. However, as already indicated, Delaware is not the same as Hawaii in this respect so the Roman case is not authority for the Hawaii legislature to reapportion itself.

Pursuant to legislation enacted by the 1965 regular session of the legislature and allowed by the Governor to become law without his signature, there will be submitted to the electorate at the general election in November 1966 the question *"Shall there be a convention to propose a revision of or amendments to the Constitution?"*, in accordance with the provisions of Art. XV, Sec. 2, of the Hawaii Constitution.

Amicus supports the logic of this Court's position in the Maryland case - namely that the plan had to be examined in its entirety. As a matter of fact it is the opinion of Amicus that "*as a whole*" applied to the reapportionment article has even more meaning when applied to the Constitution. When the legislative article is ripped out (or amended), this has a serious effect on the balance of the Constitution -- the relation of the legislature to the co-ordinate branches of government. This is one of the reasons why it would be most appropriate to have a Constitutional Convention review the proposed changes.

It might also be called to the Court's attention that the 1950 Constitution was submitted to the people "*as a whole*", and it was ratified by a three to one vote. To adopt the kind of reapportionment urged by the Governor (25 single member Senatorial districts instead of 6 and 51 Representative Districts instead of 18, proposed by him as Administration measures) and giving him the authority to reapportion and re-district every ten (10) years, would substantially shift the balance of political power within the State. The 1950 Convention gave the Governor extraordinary executive power in our Constitution (we also have a very short ballot--only the Governor and Lt. Governor--besides the legislature are elected). The Governor also holds the balance of power with respect to the Judiciary (judges being appointed by the Governor --with the consent and advice of the Senate). To give him additional powers in the determination of the composition

of the legislature--as well as to hold the pork-barrel club to punish single district legislators who refuse to buckle to the *"unit rule"*, (not as easy to do in multi-member districts) would be unwise and improper. This Court should give careful thought before it seeks to extend the *"plenary authority"* doctrine of the legislature found in the Tawes case, or to urge *"single member districts"*.

The question of single versus multi-member districts and the authority (plenary or otherwise) of the legislature are proper questions for the next Constitutional Convention--or for proposals by the legislature to the people under the Revision and Amendment section (Article XV) of the Constitution, and *"prior approval"* by the people before they become effective.

The Governor's Brief argues that the two houses are inter-related because the political districts remain intact and that Senate districts are composed of from one to four representative districts, and that the *"Governor may reapportion the House, ...only by reallocating the number of representatives and not by redrawing district lines, except in one limited circumstance. The purpose of the constitutional draftsmen in creating a scheme in which the districting of one house was substantially dependent on that of the other was undoubtedly in large part to insure that the Senate Districts would be larger geographically and a number of constituents than the House Districts."* (Governor's Brief, page 36.)

This illustrates the conjectural inaccuracies of attorneys unfamiliar with the purpose of the "constitutional draftsmen". The prime purpose was to prevent the Governor or anyone else from "gerrymandering" by redrawing the District lines--except in the "one limited circumstance"--i.e., where the "registered voters in any one representative district be less than one half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled,..." Haw. Const. Art. III, Sec. 4.

The statement in the Governor's Brief, page 37, that the District Court's Order upholding the House apportionment "*has grossly embarrassed orderly reapportionment in Hawaii.*" is preposterous. If anything is grossly embarrassing, it is the failure of the State Executive and legislative branches to comply with the provisions of the State Constitution, their refusal to abide by the decision of the Hawaii Supreme Court in August 1964 and the Federal District Court Order in February 1965.

The District Court Order should be upheld and the case remanded to the District Court to take the necessary steps to modify its time-table to require that the terms of the State Constitution be followed.

Should this Court require reapportionment in time for the 1966 election, Amicus would urge this Court to consider the following proposals in order not to "embarrass any attempt at reapportionment through constitutional amendment" as stated so succinctly on page 41, of the Governor's Brief:

(1) Have members of the legislature run under the existing apportionment plan but to have all senator's terms expire in 1968 and

(2) Remove all district barriers and have the legislature, house and senate, elected at large, and have the District Court take the necessary steps to seek compliance with the State Constitution and mandate the legislature to enact constitutional convention legislation so that a reapportionment plan approved by the people and conforming with this Courts decisions will take effect by 1968.

B - REGISTERED VOTER POPULATION VS. CENSUS TOTAL POPULATION

This issue as well as the question of single-member versus multiple-member districts are, in the opinion of Amicus, not federal or constitutional questions. They are part of the total political, economic and social fabric which needs to be considered during constitutional amendment or revision, in order best to meet the needs of the

people of the State. As long as the use of registered voter population or multiple-member districts does not result in denial of voting rights to individual citizens, or in gerrymandering, with its resultant; invidious discrimination, this Court should permit the broadest freedom and latitude for delegates to future Constitutional Conventions to fashion the structure and philosophy of State Government so as to best meet the needs of changing times.

1 FINDINGS OF THE DISTRICT COURT

Amicus supports the findings of the trial court (the District Court) set out in its February 17, 1965 decision. He calls the Court's attention to the following remarks of the Court:

"This court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term 'qualified voters' is used practically synonymously

with registered voters under Article III, Section 4."

"This court is not prepared at this time to accept plaintiff's premise that total population is the only basis upon which apportionment of state legislatures can constitutionally be based. The Court in WMCA v. Lomenzo, supra, notes that 'New York uses citizen population instead of total population, excluding aliens ..., for purposes of legislative apportionment' and apparently found nothing invidious in that fact."

***

"This court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment 'substantially on a population basis.'"

***

"If total population were to be the only acceptable criteria (sic) upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow..... For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military

> *population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature--for the following 10 years!"*
>
> ***
>
> *"....if the State were reapportioned at the present time on a straight total population basis, the Fifth senatorial district, containing within its bounds most of the military and naval installations of the State, would be entitled to 13 senators--a majority of the Senate."*

This was in February 1965. In January 1966 the situation is reversed. The Vietnam war has resulted in major shifts in the military population of Hawaii. From 10,000 to 20,000 individuals of the 25th Division are in the process of being shipped to Vietnam. (Bank of Hawaii: Review of Business and Economic Conditions Jan. 1966, p.3) Their wives and families are being relocated on the mainland. If reapportionment was to be determined on the basis of total population in January 1966, the Fifth senatorial district would lose a number of its potential Senators. A measure as unstable as this is hardly an equitable tool to provide stability in reapportionment.

On the question of the franchise for the military, the District Court found:

> "...no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens."
>
> ***

The District Court concludes that there was no indication of gerrymandering in the invidious sense:

> "This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of The Court in Fortson v. Dorsey, ... this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact 'designedly or otherwise...operate to minimize or cancel out the voting strength of (any)... elements of the voting population.' Nor did it in 1959 bring about that result."
>
> ***
>
> "As the records of the Constitutional Convention show (Proceedings, 103-111), the districting, both for the Senate and the House of Representatives, followed along historical, political,

geographic and physical lines. There was no gerrymandering in the invidious sense."

2 - WHY THE CONSTITUTIONAL CONVENTION ADOPTED REGISTERED VOTER POPULATION, RATHER THAN TOTAL CENSUS POPULATION

It might be helpful at this point to consider why the Constitutional Convention adopted registered voter population rather than total census population in its reapportionment of the House. The argument of appellant Governor that this was designed to achieve invidious results or to make political hay is without foundation in fact. Your Amicus, as a matter of record, argued strongly for the use of census population as the more appropriate measure, generally, since elected officials represent people, not just registered voters. Although he felt his argument was valid, it apparantly was not sufficiently persuasive, since he failed to get majority support from the delegates.

Amicus here, then a Convention Delegate, argued:

"ROBERTS. I would like to speak in opposition to the motion that we use registered voters as the basis for the application of equal proportions. There is a great deal of logic in the use of registered voters. It is something which is tangible, you can see it; it is something which does indicate that people have had the opportunity to go down and register, and they have indicated their interest in voting. There is just as much logic for the total votes cast. As a matter of fact a little more logic because these people actually went to the trouble of going down and casting their ballots. Now in a democracy you ought to pin a bouquet on people when they cast their ballots. I think it is a responsibility which they have, but you want to say in this thing, apparently, that you are favoring such a proposal.

I believe, however, that the proper basis for determination and distribution of the representatives should be on the basis of population. When a person comes into the House of Representatives, he isn't there to represent the people who cast their votes, he isn't there to represent the people who register, he is there to represent all of the people in that particular area, the total

population, the children who have not yet voted, the individuals, the youngsters who need taking care of, and those people who do not have the opportunity to or are too old to go to vote. The representative's job is to represent the entire population of the area. It seems to me, therefore, that population makes much more sense in terms of representative government.

There is a problem and I recognize the problem with regard to the census. That problem, however, is not an insurmountable problem. That problem can be resolved the way other states have resolved it. You reapportion your House and your Senate presumably every ten years. We said we are not going to reapportion our Senate. You reapportion the House every ten years on the basis of population. Now where do the other states get their figures? They have hundreds of districts the way we would have. All you've got to do, when the census people prepare their tabulation, is to let them know that you want them to tabulate the areas on the basis of population on the basis of the districts that you have. It is not an impossible problem, it is a very simple problem, and they will tabulate it for you on the basis of population, on the basis of the

districts that you want, and the problem can be resolved very easily. I, therefore, will vote against the proposal to use either the method of registration or votes cast." (Constitutional Convention Proceedings, Vol. II p.125)

The majority did not support this position because of the argument of the President of the Convention who pointed out that a study of the Legislative Reference bureau showed that the use of "*census population*" as against "*registered voter population*", did not result in any substantial difference in representation and that one of the reasons for previous failures of the legislatures to reapportion was the claim (valid or not) that proper census population data were not available for comparable political districts. (Proceedings. Delegate King, Vol II p.174.) Since information on registered voters was always at hand and current, and produced comparable results, it was an appropriate measure for use in the Constitution. Under all the circumstances, considering the full discussion at the Convention, it is clear that there was nothing invidious in the use of registered voter population in Hawaii in its reapportionment plan.

The Committee report points out that it did not use total citizen population as provided in the Organic Act because it was not possible to get the necessary population data. Although this may not be completely

correct in that no real effort appears to have been made by the legislature to secure the necessary data, it does explain in part why the Committee decided in favor of the use of registered voters. The Standing Committee Report No. 92 says: "*One of the reasons why the reapportionment directed by the Organic Act was not carried out was because that Act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the Territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from 1 to 2 percent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for apportionment of the members of the house was chosen as the number of registered voters.*" (Volume I, Proceedings of the Constitutional Convention, pages 250-251.)

This statement is clear and the suggested implications in the Governor's brief that the use of the registered-voters basis was designed for purposes of invidious discrimination is misleading.

The Standing Committee Report also makes it quite clear that the reapportionment of the house by the Governor was primarily a ministerial function since "*it appears highly improbable that any district in the next few decades will not be entitled, on the basis of registered voters to elect at least one representative.*" Then the report goes on to state on the same page, "*In order to insure that this duty, which is of ministerial nature, will actually be carried out, the Governor has been made specifically subject to mandamus by the Supreme Court. This is the only way in which a constitution can guarantee reapportionment and is consequently the method considered by this committee to be the most desirable.*" (Proceedings, Vol.I p.251.)

3 - THE CRITERION OF REGISTERED VOTER POPULATION IS NOT IN CONFLICT WITH REYNOLDS VS. SIMS.

The Governor's brief tends to confuse the issue by using a variety of years and figures to convince this Court that the plan of apportionment and the use of the registered-voters basis was somehow invidiously applied.

The argument further suggests that substantial inequities resulted from the application of that basis instead of population.

This court stated in Reynolds vs. Sims that the court would consider a plan to hold for at least a 10-year period if provision were made for periodic reapportionment approximately every 10 years. The Court stated in part:

> "Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining

a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect." (Reynolds vs. Sims, 377 U.S. 533, (1964).

This Court further stated "*compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.*" The period used in Hawaii is a ten-year period, and in spite of changes in registered voter population during the reapportionment periods, it is presumed under the court's decision that the apportionment which was valid in 1959 at the time when it was made would remain valid for the period until the next reapportionment.

When the House was reapportioned in 1959, pursuant to the Hawaii Constitution, there were 175,317 voters registered for the General Election in 1958. Dividing 175,317 by 51 (the number of house members) gives a theoretical number of voters that each member should represent as 3,437. The possible range would be from 1,719 voters to 5,155 voters for each representative district. This is true since a district having

one more than half of the theoretical number of registered voters would be entitled to 2 representatives when the registered voter population exceeded the theoretical number by one more than the theoretical number plus one-half of such number. When the 18 representative districts and the number of registered voters in 1958 are examined, it is clear that the representation for each member of the house is well within the permissible range:

Rep. District	1958 Reg. Voters	No. of House Members	Ratio of Members to Voters
1	2,209	1	1-2,209
2	13,836	3	1-4,609
3	2,986	1	1-2,986
4	3,862	1	1-3,862
5	2,641	1	1-2,641
6	2,560	1	1-2,560
7	14,195	4	1-3,548
8	13,876	4	1-3,469
9	5,929	2	1-2,964
10	12,926	4	1-3,231
11	10,525	3	1-3,508
12	8,372	3	1-2,791
13	7,621	2	1-3,810
14	14,134	4	1-3,533
15	21,063	6	1-3,510
16	13,746	4	1-3,436
17	13,455	4	1-3,364
18	11,381	3	1-3,797

The Governor's brief, moreover, does not note the impact of the large military population residing on military bases in the Fifth Senatorial District and the possible inclusion of tourists in the total census population figures. We have already noted that recent military action in Vietnam involved the movement of the 25th Hawaiian division to Vietnam.

The Court in Reynolds vs. Sims used the words--population, residence, citizens and voters--interchangeably but the emphasis appears to have been on the equality of voters rights-that there has to be *"some basic standard of equality among voters in the apportionment of seats in state legislatures."* 377 U. S. 533 (1964).

The use of the method of equal proportions, specified by the Hawaii Constitution, is obviously not in question since this process has been used by the Congress in apportioning the membership of the House of Representatives. Lawrence F. Schmeckebier in his book *"Congressional Apportionment"* published by the Brookings Institute in 1941 said:

"The method of equal proportions most nearly equalizes the average population per district and the individual share in a representative if the inequality is measured by the relative difference." (page 59.) *"A method of equal proportions tends to give the most equitable distribution among the states regardless of size."* (page 69.)

The record is also clear that there is no discrimination either as to eligibility or in registration of eligible voters in Hawaii. The registrars assist all who wish to register to vote. As a matter of fact, prior to elections, registrars are set up in major population centers in order to encourage registration and to obtain as large a number of eligible voters to register.

Amicus believes that the use of *"voter population"* is not discriminatory and does no violence to the federal constitution. We believe the use of registered voters is permissive under the Equal protection clause and the Court's opinion in Reynolds vs. Sims.

4 - IT MAY BE ARGUED THAT CENSUS POPULATION IS NOT A FAIR BASIS UPON WHICH TO DETERMINE EQUALITY OF VOTING POWER.

In a representative democracy, the theory is that each citizen is represented. This Court, in Reynolds v. Sims, 377 U.S. 533,565 (1964), stated this fundamental principle in the following language, "*Representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.---(Fair and effective participation) is concededly the basic aim of legislative apportionment ...*" (377 U.S., at 565-66.)

However, the Constitution of the United States was intended to be a practical document and its requirements are not theoretical. Judged by the standard of political reality, (and assuming no organized effort to prevent people from voting) census population may not be a fair basis upon which to determine equality of voting power unless each geographical unit has about the same number of voters. Otherwise, the voters in the district with fewer than the average number of voters will have an unfair advantage. For example, if there are five districts each having 5 legislators and each having a population of 1,000 but 4 districts have between 850 and 900 voters and 1 district has 400 voters, each of the

400 voters has about twice the voting power that each of the 850-900 voters has. If, in addition, the 400 voters habitually elect legislators of the same political party, their advantage may become even greater.

The District Court in its opinion already cited stated "*Hawaii is unique in many respects.*" Among such respects is the circumstance that in Hawaii the foregoing hypothetical example is the actual situation. This is demonstrated by the statistical information set forth on Page 7 of the Governor's Brief. If the relationship between 1964 registered voters and 1960 population in each of the six Senatorial Districts is determined, it will be seen that the relationship is about the same in the First, Second, Third, Fourth and Sixth but markedly different in the Fifth District, with the result that if population were the basis, each voter in the Fifth would have a vote of much greater weight, (in terms of the number of persons voted for) than the vote of a voter in any other District. This point is dramatically illustrated on Page 55 of the Governor's Brief, where it is stated that 1960 population would give the Fourth District 7 Senators and the Fifth District 13 Senators, whereas the 1964 registered voters would produce 9 Senators in each District. Based on 1960 population, a Fifth District vote would elect 2 Senators whereas a Fourth District vote would elect only 1 Senator.

The foregoing situation may be the hard core of the apportionment problem in Hawaii. The portion of the Fifth Senatorial District with installations such as Schofield Barracks, Pearl Harbor, Hickam Field and Tripler Hospital, contains thousands of military personnel and their families. Few are registered voters in Hawaii (see Governor's Brief, page 65). For years this geographical area has been almost solidly Democratic. As indicated, on a census population basis this area will elect twice as many Senators as on a registered voters basis. This will produce an even greater concentration of political power in the Democratic Party than presently exists. The two-party system is vital to our form of government. Inequities in apportionment which will sap the strength of the two-party system is contrary to our political philosophy. In addition, as noted by the District Court in its February 17, 1965 DECISION AND ORDER, "*the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear.*" The District Court, in its opinion already cited, emphasizes the political realities of this situation in the following language "A *theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the 1960 census, with the primary consideration being substantial equality of total population, gave Oahu 20 senators out of 25, and 41 representatives out of 51.*

(TR 189 - Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that included Schofield Barracks *"in fact, it is completely Schofield Barracks,"* (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, *"In point of registered voters it would be the smallest district on the island."* (TR 191)

C - SINGLE VERSUS MULTIPLE-MEMBER DISTRICTS

Amicus has previously noted that this question does not present a federal or constitutional question. At best, appellants are seeking an advisory opinion from this Court.

Since the question has been raised, and argued at length by appellants, the following observations may be in order: (1) Fortson v. Dorsey, suggests that ample latitude is available on the State level for the use of multiple-member districts in reapportionment, provided that such districts are not set up invidiously; (2) Appellant Governor has not effectively distinguished the Dorsey case to make it inapplicable to the situation in Hawaii; (3) The literature and pragmatic research on the subject of single versus multiple-member districts has hardly reached a level to make valid any conclusions on the relation of single or multiple-member districts to equality of voting rights or the representative character of State legislatures; (4) One authority suggests that the electoral system in use, rather than the single or multi-member district is the key factor in determining the representative character of a State legislature; (5) The proper evaluation of any system of districting should lie in the context of the operation of the individual State system, its historical development and the extent to which it serves well the needs of the people of

the State.

The Governor's brief (at p.72) admits "...*that in* Fortson v. Dorsey, 379 U.S. 433 (1964), *a system involving multimember districts employed in Georgia was held not to violate, on its face, the Equal Protection Clause.*" The effort to show that the situation in Dorsey is "*clearly distinguishable*", from Hawaii falls on its face. The Governor's claim that the districting in Hawaii is "*purely arbitrary*", is contrary to the record and the findings of the trial court below. The District Court found the basis in historical, geographic and political factors. This is supported by Defendant's brief in the District Court, dated November 17, 1964 which showed that the districts were set up on a sensible and rational pattern and were not designed to gerrymander or to discriminate.(Defendant's Brief, pp10-19) The District Court made the same finding.

The Governor's contention that the basis for the challenge is different from that in Dorsey, may be valid, but a challenge is not a distinguishing feature, or proof of the existence of discrimination or impairment of the right to vote.

The final argument in the Governor's brief, seeking to distinguish the Dorsey decision, is the question of the "*submergence of minorities within large multi-member districts.*" On page 72 the Governor's brief alleges (without proof) that "*In Hawaii, there is evidence of submergence of minorities.*"

On page 81 however, the Governor's brief admits that "...*extensive proofs were not put in as to the details of the submergence of minorities.*" The District Court made no findings that there was any "*submergence of minorities*" in Hawaii.

Concerning the literature it may be fairly stated that for many years, the literature of political science assumed and reiterated that single-member districts constituted the prevailing method for the election of state legislators. However, careful empirical research in 1955 established that the exceptions to this so-called "*rule*" were many, not few. As of that date, only 9 states chose all legislators from single-member districts, and in earlier years, the number of such was even smaller. Of even greater interest, is the "*newly discovered*" fact that, although only 12 per cent of all state senate seats reflected multi-member districts, 45 per cent of some 5,762 state house of representative members were selected from multi-member districts (in 36 states, including Nebraska).

Maurice Klain, "*A New Look at the Constituencies: The Need for a Recount and a Reappraisal,*" 49 American Political Science Review 1105-19 (December, 1955). See also, Ruth C. Silva, "*Compared Values of the Single-and the Multi-Member Legislative District,*" 17 Western Political Quarterly 504-16 (September, 1964), and by the same author, "*Relation of Representation and the Party System to the number of seats apportioned to a legislative district.*",

Western Political Quarterly (December, 1964).

Unfortunately, there has been little follow-up to test empirically the extent to which electoral results differ as between the single-member and multi-member districts which have long existed side-by-side on the state level in the U.S., perhaps because most political scientists still think the multi-member district is the rare exception. Thus, the hypothesis of most U.S. "*good government*" reformers (including Montesquieu) that the single-member district "*is better*" remains as untested as the general challenge to single-member districts in the U.S. made by James Bryce. However, one recent study of the multi-member districts in Pennsylvania contradicts at least one of the leading tenets of single-member district advocates -- namely a breakdown in the two-party system due to multi-member districts. "*There has certainly been no breakdown in the two-party system of the sort that some scholars predict as the price of multi-member districting.*"

Frank Sorauf, Party and Representation. New York: Atherton Press, 1963. (Co-winner of the 1962 Atherton Press Political Science Prize)

It is the belief of Amicus that much more careful and detailed study and research needs to be done in this area of political life. Existing studies are hardly sufficient to make a finding that single or multiple districts in the United

States will assure more representative government or better protect the will of the majority.

One authority who has written in this field suggests that the electoral system is the key factor to be studied rather than the single-versus multiple-member district. She says: *While the party system and the representative character of the legislature are related to the number of members apportioned to a legislative district, these relationships are indirect--and the electoral system used in the district is the link connecting the 'cause' with the 'results."* Ruth C. Silva "*Compared values of the single- and the multi-member Legislative District.*" Western Political Quarterly, September 1964 p. 516. See also James D. Barnett, "*Unitary-Multiple Election Districts*", American Political Science Review, February 1945, pp 65-67.

Professor Silva in the opening paragraphs of her recent article in the Western Political Quarterly cited above on the "*Relation of Representation and the Party system to the number of seats apportioned to a legislative district*", sums up her conclusions as follows:

"*The number of seats apportioned to a legislative district has been alleged to yield nine results. The single-member district, for example, has been said to produce localism, less able candidates, shorter legislative tenure, greater opportunity for gerry-mandering, weak and decentralized parties, an emphasis of candidates rather than on parties or issues, a*

particular kind of legislative responsibility to the electorate, a less representative legislature, and a two party rather than a multi-party system. The multi-member district allegedly produces nine opposite results. Both facts and logic show, however, that the first seven of these 'results' are spurious in the case of either the single-member or the multi-member district. Although the number of seats apportioned to a district does influence both the party system and the representative character of the legislature, the connecting variable is the electoral system used in the district."

"Analysis of the multi-member and the single-member constituency necessarily raises the question of the electoral system, which in turn raises a normative and more subjective question concerning the legislature's proper function. One electoral system may be suitable for a legislature that plays one role but may also impair the legislature's ability to perform other important duties." (Ruth C. Silva, in Western Political Quarterly, December 1964.)

The extent to which the Governor's brief goes to find a scintilla of "arbitrariness" and what it seeks to present to this Court as "evidence" are almost amusing. For example, to support the claim that the district lines are arbitrary the Governor's brief on p. 74, states that the Governor cannot, under the terms of the Constitution, change the district

lines, and that he may do so "*only as a last resort - when on a mathematical basis the indicated apportionment in a Representative District falls below one-half of a representative, is there to be any change of the district lines.*" This is a correct statement of what the State Constitution provides, but the conclusion which the Governor's brief arrives at from this fact is completely erroneous. The Governor's brief holds that "*this provision...appears (to be) confirmatory evidence of arbitrariness.*" The district lines were fixed to prevent the Governor or anyone else from gerrymandering. The delegates reserved to themselves the right to determine when and how to redistrict. The State Constitution provides for constitutional amendment or revision by a convention, and subsequent approval by referendum of the people. The Committee Report of the Convention pointed out the slim likelihood of the Governor having to redistrict under the '*ministerial*' functions assigned to him under the Constitution. The lack of knowledge shown in the Governor's brief about the purpose and intent of various provisions of the State Constitution is distressing.

Amicus is of the belief that Appellants have made no showing of any discrimination or arbitrariness or invidious effect of the districting under the Hawaii Constitution. In the light of the limited knowledge of the impact of single versus multi-member districts and the basis for the establishment of districts in Hawaii, the appropriate balance of single as against multi-member districts; or for that

matter a unicameral versus bicameral legislature; the number of legislators; the terms of office etc, are matters appropriately left for the next Constitutional Convention. Amicus urges this Court to uphold the February 17, 1965 decision of the District Court, and to require prompt implementation of this Court's June 1964 decisions.

V - CONCLUSIONS

Amicus believes that the litigations involving Reapportionment in Hawaii have not been adversary proceedings. He believes that Appellants did not file a timely appeal to the February 17, 1965 Order of the District Court; that the Governor per se has no standing before this Court and that the issues presented by Appellants are requests for advisory opinions and do not present substantial federal questions.

The only question is whether it was an error for the District Court to have decreed that the Legislature of Hawaii should adopt legislation pursuant to Article XV of the Constitution of the State of Hawaii, providing for submission to the people of Hawaii the question *"Shall there be a convention to prepare a revision of or amendments to the Constitution?"* and for any and all acts required by law to implement such legislation, and further providing in the event of an affirmative vote, for election of delegates to a constitutional convention and for an election on any proposed amendments adopted by the constitutional convention, said amendments including, but not limiting the convention thereto, provisions reapportioning the Senate of Hawaii on a Constitutionally valid basis." Amicus believes that the District Court's Decision was correct, namely that "...any change in the representation from any senatorial district must be by constitutional amendment. This Court concurs!"

For the foregoing reasons the appeals should be dismissed and the February 17, 1965 order below affirmed.

Respectfully submitted

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Petitioner

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January 1966

ADDENDUM:

Amicus on review of his brief has noted that he failed to comment on the question as to whether the apportioning of delegates to the Constitutional Convention required by the District Court Order of Feb. 17, 1965, would have to conform to the *"substantially on the basis of population"* criteria set out by the Court for legislative apportionment.

The District Court decision accepted the provisions of the State Constitution as adequate under the circumstances. It should be noted that the 1950 Constitutional Convention gave Oahu a majority of the delegates. Under the Constitution the delegates left the Legislature free to determine the number of delegates, the districts etc., in the calling of future conventions. In anticipation of a deadlock, however, the delegates had the foresight to set out the procedures--namely *"as nearly as practicable"* as that required for the 1950 Convention. (Article XV, Sec. 2)

An attempt to draw a direct parrallel between the criteria for legislative apportionment and Constitutional apportionment is questionable. The people of the State have a final review and veto power over proposed Constitutional amendments or revisions, they do not have such veto power over legislative enactments. Additionally States may set up Constitutional Commissions to propose revisions of their Constitution. To suggest that such a Commission be apportioned on the basis of population would be stretching the import of Reynolds v. Sims.